In the Supreme Court of the United States

OCTOBER TERM, 1950

No. —

UNITED STATES OF AMERICA AND ELEUTERIA BROWN ARENAS, ALSO KNOWN AS DELLA NICHOLSON, PETITIONERS

v.

JOHN W. PRESTON, OLIVER O. CLARK, AND DAVID D. SALLEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States and Eleuteria Brown Arenas, prays that a writ of certiorari issue to review the judgment entered on March 23, 1950, by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the District Court (R. 41-48) is not reported. The opinion of the Court of Appeals (R. 284-285) is reported at 181 F. 2d 69.

JURISDICTION

The judgment of the Court of Appeals, affirming in part the judgment of the District Court, was entered on March 23, 1950 (R. 285-286). The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254(1).

STATEMENT[1]

This is a companion case to that of *United States and Lee Arenas* v. *John W. Preston, et al.*, in which the Government has simultaneously herewith filed a petition for a writ of certiorari. It involves the same parties, with the exception of the Indian allottee, and the same legal issues. The facts herein may be briefly stated as follows:

After the district court had found that Lee Arenas was entitled to trust allotments and the court of appeals had affirmed in part, respondents filed a complaint for trust patent on behalf of Eleuteria Brown Arenas (R. 74, 176-177), their contract of employment providing, as in the case of Lee Arenas, for payment on a *quantum meruit* basis, "all to be subject to the rules and regulations of the Department of the Interior" (R. 180-181). The district court entered judgment in favor of the Indian allottee, and no appeal was prosecuted (R. 11, 29). Thereupon, respondents filed their petition for supplemental decree for attorneys'

[1] The question presented herein, and the pertinent statutory provisions involved, are identical with those in the companion *Lee Arenas* petition.

fees and expenses advanced (R. 2-14), and the Indian and the United States were ordered to show cause why the relief sought should not be granted (R. 15-16). The Government's motion to dismiss (R. 16-19) was denied (R. 64), and answers were filed by the allottee (R. 26-33) and lodged by the United States (R. 34-41, 64, 82-83), denying any jurisdiction in the court to affect the allotment in any way. On January 3, 1949, the court filed its opinion holding that it had jurisdiction to make an allowance for attorneys' fees and expenses by virtue of its general equity jurisdiction as invoked by the 1894 Act and that the United States was not an indispensable party to the proceeding inasmuch as the judgment ran against only the Indian and her allotment (R. 41-48, 64). Findings of facts and conclusions of law were filed (R. 49-55) conforming generally to the opinion. The court found that respondents were entitled to receive 12½% of the value of the allotment as fees and an additional amount as reimbursement for expenses (R. 51-52), but no finding was made as to the value of the allotment except that, as alleged in the petition, it was in excess of $300,000 (R. 7, 51). It was also found that respondents were entitled to a lien on the allotment and that it was reasonable and equitable that the allotment be sold and the proceeds divided between the allottee and respondents (R. 52-53). A judgment (R. 56-62) was entered, which went farther than that in the

Lee Arenas case by making provision for an immediate sale of the lands (R. 59-60).[2]

Upon appeal the court below affirmed in part and reversed in part (R. 284-285). It disagreed with the district court's theory that the allotment was free from any interest of the United States, and also as to the amount awarded as reimbursement for expenses advanced. However, it agreed, as in the *Lee Arenas* case, that the district court had jurisdiction to make an allowance for attorneys' fees out of the allotment, and remanded the case with instructions to proceed to fix the attorneys' fee and secure its payment by a lien, all to be in accord with its expressions in the *Lee Arenas* case (R. 285-286). The court also pointed out that the lien should be foreclosable only after a reasonable period had elapsed in which payment could be made (R. 285).

REASONS FOR GRANTING THE WRIT

This case presents exactly the same legal questions and involves the same respondents as the case of *United States and Lee Arenas* v. *John W. Preston, et al.* In the petition for certiorari filed in that case, the Government has set forth at length its reasons for believing that review of the issues involved is warranted. The Court is respectfully referred, therefore, to the *Lee Arenas* petition.

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[2] The fee proceeding in the *Lee Arenas* case was heard by Judge Mathes, while Judge Cavanah presided in the instant case.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JUNE 1950.

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IN THE

Supreme Court of the United States

October Term, 1950.
No. 138.

UNITED STATES OF AMERICA and LEE ARENAS,
Petitioners,

vs.

JOHN W. PRESTON, OLIVER O. CLARK, and DAVID D. SALLEE,
Respondents.

Brief of Respondents in Opposition to the Petition for a Writ of Certiorari.

Opinions Below.

The oral views of the District Court are stated at pages 40-48 of the record. The opinion of the Court of Appeals is found at pages 210-218 of the record and is reported in 181 F. 2d at pages 62-68.

Jurisdiction.

The District Court has equity jurisdiction under the Act of August 15, 1894, as amended, Title 25, U. S. C. A., Section 345, and under the Act of March 3, 1911, as amended, Title 28, U. S. C. A., Section 1353, to determine the right of Lee Arenas to trust patents covering the

lands selected for allotment by him and his deceased wife Guadaloupe Arenas, and to adjudge and decree his said right with the same effect as if trust patents to the lands so selected had been issued by the Secretary of the Interior. The equity jurisdiction of the District Court under said statutes extended to the allowance of attorneys' fees and expenses of suit and to impressing a lien upon said lands to secure the payment of said fees and expenses.

The Court of Appeals had jurisdiction on appeal under Title 28, U. S. C. A., Section 1291.

This Court may, but we submit should not, review the decision of the Court of Appeals under Title 28, U. S. C. A., Section 1254(1).

Question Presented.

Since the District Court had equity jurisdiction under 25 U. S. C. A., Section 345, and under 28 U. S. C. A., Section 1353, to adjudge and decree the right of Lee Arenas to trust patents covering the lands selected by him and his deceased wife for allotment in severalty, did not such equity jurisdiction necessarily extend to the allowance of attorneys' fees and expenses of suit and to the impressing of a lien upon said lands, recovered for Arenas by said attorneys, to secure the payment of said fees and expenses?

The Court of Appeals stated the principal question involved herein as follows (181 F. 2d at p. 65):

> "Does the equity jurisdiction of federal courts under the Act of 1894 invoke all equitable processes and hence permit the application of rules '. . . which experience has shown to be essential to the

adequate protection of a wronged *cestui que trust* . . .?' United States v. Equitable Trust Co., 1931, 283 U. S. 738, 745, 51 S. Ct. 639, 641, 75 L. Ed. 1379."

Other questions incidental to the principal question involved herein will be stated and discussed in the argument.

Statutes Involved.

1. The Act of August 15, 1894, 28 Stat. 286, 305, as amended, 25 U. S. C. A., Section 345, insofar as pertinent, is set forth at pages 2 and 3 of the petition.

2. The Act of March 3, 1911, 36 Stat. 1904, as amended, 28 U. S. C. A., Section 1353, reads as follows:

> "The district courts shall have original jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty.
>
> "The judgment in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him . . ."

3. The Mission Indian Act of January 12, 1891, 26 Stat. 712, and the General Allotment Act of February 8, 1887, 24 Stat. 388, as amended, 25 U. S. C. A., Section 331 *et seq.*, the pertinent portions of which are set forth in the Appendix to the petition herein, at pages 21-24.

Statement.

This suit was brought by Lee Arenas against the United States, in December, 1940, to have determined his right to allotments of land situated in the Palm Springs Indian Reservation. After years of litigation, Arenas was awarded judgment for the lands selected by him and his wife Guadaloupe for allotment in severalty. *Arenas v. United States,* 60 Fed. Supp. 411. The history of this litigation will be found in *Arenas v. United States,* 137 F. 2d 199; *Arenas v. United States,* 322 U. S. 419, reversing the judgment of the Court of Appeals; *Arenas v. United States,* 60 Fed. Supp. 411; *United States v. Arenas,* 158 F. 2nd 730, affirming judgment below as to the allotments to Lee Arenas and Guadaloupe Arenas, *certiorari* denied 331 U. S. 842.

In its judgment on the merits, *Arenas v. United States,* 60 Fed. Supp. 411, the District Court retained jurisdiction

> "for the purpose of adjudicating the reasonable sums that shall be allowed and paid to the attorneys of record for plaintiff for their services rendered to him in this action and for expenses necessarily incurred by them in his behalf in the prosecution thereof for the purpose of making all necessary and proper orders, judgments and decrees for the securing and payment of all such sums so found due and owing by the plaintiff to said attorneys."

Following judgment, and after this Court denied *certiorari, United States v. Arenas,* 331 U. S. 842, respond-

ents Preston, Clark and Sallee, who had conducted the litigation from its inception on behalf of Lee Arenas, filed their petition in the District Court for a supplemental decree for attorneys' fees and expenses of suit [R. 2-12], upon which an order to show cause issued and was served upon petitioners. The United States specially appeared and moved to dismiss, principally on the ground that it had not submitted to the jurisdiction of the District Court as to the allowance and payment of attorneys' fees and expenses of suit. [R. 15-17.] The motion was denied [R. 27], and thereafter the United States filed an answer to said petition for supplemental decree on behalf of itself and Lee Arenas. [R. 28-38.] Said petition was thereafter heard on the merits, evidence was submitted by all of the parties, and the Court made and filed its findings of fact and conclusions of law and entered judgment thereon for petitioners [R. 40-53], allowing to John W. Preston a fee of 12½% and to Messrs. Clark and Sallee a fee of 10% of the value of the lands allotted to Lee Arenas and Guadaloupe Arenas, and expenses of suit in the amount of $258.67. [R. 50-51.] The judgment and decree further provided that the payment of said fees and expenses of suit "be and the same is hereby secured by an equitable lien upon the allotments made to Lee Arenas and Guadaloupe Arenas . . . and upon all rights conferred by said allotments . . . and said equitable lien shall be and continue in full force and effect until . . . (said fees and expenses) shall be fully paid and satisfied." [R. 52.] Both Arenas and the United States appealed to the Court

of Appeals, 9 Cir., and said Court affirmed the judgment in all respects, except only the Court held that "the District Court should have proceeded expressly to fix the dollar value of the services performed as the basis for the sum secured by the lien and in so doing should have considered and determined the value of the thing secured by the litigation, namely, the reasonable value of the Indian's interest in the allotted land under the trust patent, as one of the elements to be taken into consideration." [R. 217-218.] The cause was ordered remanded to the District Court "with instructions to determine the sum of money for which amount the lien against the allotted property is to be impressed." [R. 218.] Thereupon the United States and Lee Arenas filed their petition for a writ of *certiorari* to review said judgment and decree.

The petitioners advance three reasons for granting the writ prayed for, namely: (1) that no part of the lands secured by respondents for Arenas can be sold to pay attorneys' fees and expenses of suit (Pet. pp. 8-15); (2) that the general equitable principle, allowing attorneys' fees for recovering trust property, as applied in *United States v. Equitable Trust Co.*, 283 U. S. 738, does not govern in the instant case, although they concede the general principle is applicable "in cases where a next friend prosecutes a successful action on behalf of an incompetent (as in the Equitable Trust situation), or where a party by his own efforts secures a fund in which others will share . . ." (Pet. p. 15); and (3) that if the decision is allowed to stand "the door

is open to the circumvention of the allotment policy" set up by the Department of Indian Affairs. These reasons are both unsound and inequitable under the facts and law of this case.

Summary of Argument.

The United States consented to be sued in this action. Act of August 15, 1894, as amended, 25 U. S. C. A., Section 345, 28 U. S. C. A. Section 1353.

The jurisdiction of the District Court under 25 U. S. C. A., Section 345, and under 28 U. S. C. A., Section 1353, is essentially equitable.

In the exercise of its equity jurisdiction the District Court has power to allow attorneys' fees and expenses of suit.

As an incident to the exercise of its equity jurisdiction the District Court may impress a lien upon the property recovered for an Indian to secure the payment of attorneys' fees and expenses of suit, and may order a sale of so much of said property as may be necessary to satisfy such lien.

The position of the United States is contrary to equity and justice. It should not be permitted to capitalize its breach of trust, or take advantage of its own wrongdoings.

The rule announced and followed by the District Court and the Court of Appeals is for the benefit and not to the detriment of the Indian.

ARGUMENT.

I.

The District Court Has Jurisdiction and Power to Allow Attorneys' Fees and Expenses of Suit in an Action to Determine an Indian's Right to a Trust Patent to Lands Selected by Him for Allotment in Severalty.

The Act of August 15, 1894, as amended, 25 U. S. C. A., Section 345, evidences the consent of the United States to be sued by any person of Indian blood or descent to determine his right to an allotment of land in severalty. This principle is too well established to require citation of authority other than the statute itself. (25 U. S. C. A., Section 345.)

The jurisdiction conferred upon the District Courts under 25 U. S. C. A., Section 345, is equitable. It could not be otherwise, since, manifestly, the suit authorized under the statute is that of the beneficiary of a trust against the trustee thereof, or that of a ward against his guardian. The federal courts have uniformly held that such a suit is of equitable cognizance. (*Halbert v. United States,* 283 U. S. 753; *Hy-Yu-Tse-Mil-Kin v. Smith,* 194 U. S. 401; *Gerard v. United States,* 167 F. 2d 951; *United States v. Hellard,* 322 U. S. 363, 368; *Arenas v. United States,* 60 Fed. Supp. 411, 419; *United States v. Arenas,* 158 F. 2d 730, 746-747; *Pape v. United States,* 19 F. 2d 219.) This Court expressly so held in the *Hy-Yu-Tse-Mil-Kin* case, *supra,* which was brought under the Act of 1894, 25 U. S. C. A., Section 345, saying in respect thereto:

> "*This is a suit in equity* . . . to obtain the cancelation of an allotment of land, made by the

> officers of the government to the appellant . . . and to have the land allotted to her (the appellee)." (Italics ours.)

Petitioners assert that "The 1894 Act contains no consent to the invocation of 'all equitable processes' including a power to sell the land, as held by the Court below." (Pet. p. 11.) This is tantamount to saying that while the Act confers jurisdiction upon the District Courts without qualification or restriction, nevertheless the Courts cannot exercise their judicial power under such statutory grant of jurisdiction.

Moreover, the petitioners overlook the fact that the judicial power of the District Courts derives not from Congress, but from the *Constitution, Article III, Section 1,* which provides:

> "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

Section 2 of the same Article provides:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution (and under) the laws of the United States . . . to controversies to which the United States shall be a party . . ."

When Congress, by the Act of 1894, 25 U. S. C. A., Section 345, conferred jurisdiction upon the District Courts to determine the right of an Indian to an allotment of land, such courts were thereby authorized to exercise the full judicial power, both legal and equitable, granted by the Constitution.

"Judicial power," says Mr. Justice Miller in his work on the Constitution, "is the power of a court to decide and pronounce a judgment *and carry it into effect between persons and parties who bring a case before it for decision.*" (Italics ours.) (Miller, Const. 314.)

See, *Muskrat v. United States,* 219 U. S. 346, where the question is fully discussed and the authorities are cited; also, *Binderup v. Pathe Exchange,* 263 U. S. 291, 305.

It is well settled that federal courts in equity suits have power to allow counsel fees and expenses of suit in appropriate situations. *Sprague v. Ticonic National Bank,* 307 U. S. 777, 779, and cases there cited. In the *Sprague-Ticonic* case, *supra,* the Court said:

> "Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts. The 'suits in equity' of which these courts were given 'cognizance' ever since the First Judiciary Act, 1 Stat. 73, constituted that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery (citing cases) subject, of course, to modifications by Congress, *e. g.,* Michaelson v. United States, 266 U. S. 42, 45 S. Ct. 18, 69 L. Ed. 162, 35 A. L. R. 451. The sources bearing on eighteenth-century English practice—reports and manuals—uniformly support the power not only to give a fixed allowance for the various steps in a suit, what are known as costs 'between party and party', but also as much of the entire expenses of the litigation of one of the parties as fair justice to the other party will permit, technically known as costs 'as between solicitor and client'."

The power of the federal courts to allow attorneys' fees and expenses of suit, as between solicitor and client,

has never been in doubt since the decision in *Trustees v. Greenough,* 105 U. S. 527, where it was held: (1) that it is a general principle that a trust estate must bear the necessary expenses of its administration and preservation, and (2) that where one jointly interested with others in a common fund maintains an action to save it from waste or destruction he may have contribution proportionately from the others for attorneys' fees and expenses. A much simpler and stronger case is presented where, as here, the matter is solely between attorney and client.

The equity of the rule invoked is stated in *Louisville, E. & St. L. R. Co. v. Wilson,* 138 U. S. 507, as follows:

> "We think it may fairly be held that a party who takes the benefit of such a service ought to pay for it, and that equity may properly decree payment therefor. As justly remarked by Lord Kenyon in Read v. Dupper, 6 Term R. 361, 'the principle has long been settled that a party should not run away with the fruits of a cause without satisfying the legal demands of his attorney, by whose industry and expense these fruits were obtained.' In Renick v. Ludington, 16 W. Va. 378, 392, it is said: 'The lien (even in cases of *quantum meruit*) is in the nature of an equitable lien (Van Leer v. Van Leer, 3 Coop. (Tenn.) page 23), and is based on the natural equity that the plaintiff ought not to be allowed to appropriate the whole of a judgment in his favor without paying thereout for the services of his attorney in obtaining such judgment.' See, also, Mahone v. Southern Tel. Co. (C. C.) 33 F. 702, and in *re* Paschal, 10 Wall. 483 (19 L. Ed. 992)."

The equitable principles above stated are ignored by the petitioners, although those principles form a necessary part of the law applicable to this case.

II.

As an Incident to the Exercise of Its Equity Jurisdiction the District Court Has Power to Impress an Equitable Lien upon the Lands Secured for Arenas by Respondents' Skill and Labor and to Order a Sale of so Much Thereof as May Be Necessary to Satisfy Such Lien.

It is a general rule in courts of equity that where trust property is recovered or preserved through their intervention, it may be charged with costs and expenses, including reasonable attorneys' fees. This rule has been held to apply to the restricted property of Indians. (*United States v. Equitable Trust Co.,* 283 U. S. 738; *United States v. Anglin & Stevenson,* 145 F. 2d 622; *Anglin & Stevenson v. United States,* 160 F. 2d 670. *Cf. United States v. The Thekla,* 266 U. S. 328; *The Siren,* 7 Wall. 152, 19 L. Ed. 129; *New York Dock Co. v. The Poznan,* 274 U. S. 117.)

The decision in *United States v. Equitable Trust Co.,* 283 U. S. 738, is, we believe, squarely in point and controlling here. In that case the guardian as next friend of Jackson Barnett, an incompetent Creek Indian, employed eminent counsel to bring suit, and suit was brought, to recover Liberty Bonds of the value of $1,100,000.00 which Barnett, with the approval of the Secretary of the Interior, had given to his wife and the American Baptist Home Mission Society. About one year thereafter the Attorney General was given leave to intervene in the suit on behalf of the United States, after which the several attorneys "harmoniously prosecuted the action to a successful conclusion" (*id.* page 742), but the major burden of the suit was carried by the attorneys for the next friend. In the decree restoring the bonds to the Secretary of the Interior the Court reserved for future

consideration and determination the matter of allowance of attorneys' fees and expenses of suit. Thereafter the attorneys for the next friend filed their application for fees and expenses which, as here, was actively opposed by the United States. The District Court allowed fees in the amount of $184,881.08 and expenses in the amount of $4,282.93 and ordered those amounts to be paid out of the bonds recovered in the suit. On appeal, the Circuit Court of Appeals affirmed the judgment but reduced the fees to $100,000.00. This Court granted *certiorari,* and affirmed the judgment, but further reduced the fees to $50,000.00. The United States contended there, as here, that the bonds or "fund" recovered were "restricted" property hence "not subject to disposal in any form or for any purpose, save with the consent of the Secretary of the Interior," and argued "that the Court by charging the fund with the costs and expenses and requiring their payment therefrom would be disposing of a part of the fund in violation of applicable restrictions." (*Id.* page 744.) In substance, the argument is the same here. It is important to note that there the restricted property consisted of bonds purchased with the income from oil produced from the land allotted to Barnett, while here the restricted property consists of lands allotted to Arenas and his wife.

In passing upon the contention that the attorneys' fees and expenses of suit could not be paid out of "restricted" property without the consent of the Secretary of the Interior, the Court said (*id.* page 745):

> "We make the assumption that the restrictions had substantially the same application to the fund that they had to the land from which it was derived, but we think the argument carries them beyond their purpose and the fair import of their words. Without

> doubt they were intended to be comprehensive and to afford effective protection to the Indian allottees, but we find no ground for thinking they were intended to restrain courts of equity when dealing with situations like that disclosed in this litigation from applying the rules which experience has shown to be essential to the adequate protection of a wronged *cestui que trust* such as Barnett was shown to be."

It thus appears that in the *Equitable Trust* case the Court assumed as the basis of its decision the exact factual situation that exists in the case at bar. But the Court held that while the restrictions upon the alienation or incumbrance of the restricted funds (here lands)

> "were intended to be comprehensive and to afford effective protection to the Indian allottees . . . we find no ground for thinking they were intended to restrain courts of equity when dealing with situations like that disclosed in this litigation from applying the rules which experience has shown to be essential to the adequate protection of a wronged *cestui que trust* . . ."

The "rules" referred to by the Court are the same general rules which the petitioners contend (Pet. pp. 11-12) are not conferred upon the federal courts in suits against the Government. This is made clear by the Court's statement that:

> "It is a general rule in courts of equity that a trust fund which has been recovered or preserved through their intervention may be charged with the costs and expenses, including reasonable attorney's fees, incurred in that behalf." (283 U. S. 744.)

Petitioners' statement of the rule, which is ordinarily applicable to restricted Indian property, is not apposite

where, by reason of the wrongful refusal of the Department of Indian Affairs to approve a selection of lands for allotment in severalty and to issue a trust patent therefor, the Indian is compelled, as here, to employ counsel and bring suit against the United States to recover his property. Under such circumstances the suit is that of a wronged *cestui que trust* against a trustee who is illegally depriving him of his property. The benefit secured for the Indian by such a suit warrants a court of equity in requiring the *res* recovered to bear the costs and expenses of the litigation, including attorneys' fees. And this may be done without violating the general rule that an Indian may not sell or encumber his restricted lands.

The Court of Appeals said in respect to the Government's contention that no part of the restricted lands of Arenas could be sold to pay fees and expenses, *Arenas v. Preston,* 181 F. 2d 62, at page 66:

> "The appellant's argument carried it to the cruelly farcical posture that the government must protect the Indian by strictly preventing any diminution of the allotted land even though by exercising such protection the Indian without funds cannot have any part of his rightful allotment of land. 'It must be remembered that the fundamental consideration is the protection of a dependent people.' United States v. Pelican, 1914, 232 U. S. 442, 450, 34 S. Ct. 396, 399, 58 L. Ed. 676. And legislation must be construed in a way most favorable to the Indian. United States v. Calestine, 1909, 215 U. S. 278, 290, 30 S. Ct. 93, 54 L. Ed. 195; Choate v. Trapp, 1912, 224 U. S. 665, 675, 32 S. Ct. 565, 56 L. Ed. 941; Chase v. United States, 8 cir., 1916, 238 F. 887, 893; Arenas v. United States, D. C. S. D. Cal. 1945, 60 F. Supp. 411, 420."

III.

The Attitude of the United States in Respect to the Attorneys' Fees and Expenses of Suit Due and Owing to the Respondents Is Contrary to Equity and Justice.

From the effective date of the Act of March 2, 1917, directing the Secretary of the Interior to make allotments of land in severalty to the Mission Indians of California, to the date of the final judgment in this suit, the Government of the United States persistently failed and refused to make any allotments to the members of the Palm Springs Band of said Indians. This failure and refusal of the Government has frequently been commented upon by the federal courts, and has been held by them to be a dereliction of fiduciary duty. (*Arenas v. United States,* 322 U. S. 419; *United States v. Arenas,* 158 F. 2d 730; *Arenas v. United States,* 60 Fed. Supp. 411.) Because of such failure and refusal, Arenas was compelled to employ counsel to bring this suit.

In the present supplementary proceeding the Government is attempting to take advantage of its own wrongdoing, notwithstanding which it argues this case as though it had been at all times an impeccable trustee. Its attitude is more sanctimonious than sacrosanct, when it is remembered that for nearly one-third of a century it refused to obey the positive mandate of Congress, Act of March 2, 1917, or to perform its fiduciary duty to its Indian wards. As to this wilful dereliction of duty it remains discreetly silent in the petition herein.

This is not an ordinary case where the holder of a deed or encumbrance on restricted Indian land is asking the Court to enforce it. This case is *sui generis,* and its equities are so plain that there is no room for doubt.

But for the skilled services of respondents over a period of nearly ten years, Arenas would doubtless still be denied the lands secured for him in this suit.

The basic weakness of the Government's position is that it ignores the fact that the suit authorized by the Act of 1894, 25 U. S. C. A., Section 345, is equitable, and that principles of equity must be applied in such a suit. The Act granted to the District Courts unqualified and unrestricted jurisdiction as to an Indian's right to an allotment, under which said Courts could exercise their full judicial power under the Constitution, "to decide and pronounce a judgment *and carry it into effect* between persons and parties" before them. *Miller, Const. 314, supra.*

The Government does not expressly deny that the District Court has jurisdiction and power to impress an *equitable lien* upon the lands judicially allotted to Arenas to secure payment of attorneys' fees and expenses of suit. It asserts that respondents do not have a *charging* lien on the lands of Arenas under the statutes and decisions of California, and cites California Code of Civil Procedure, Section 1021, and *Wagner v. Sariotti*, 56 Cal. App. 2d 693, to support the assertion. Respondents do not rely upon a charging lien, but upon an equitable lien. In the very case cited by petitioners, namely, *Wagner v. Sariotti*, 56 Cal. App. 2d 693, the Court said, at page 698:

> "The equity courts look with favor upon equitable liens, and frequently such liens are employed to do justice and equity and to prevent unfair results. (Carter v. Holt, 28 Cal. App. 796 . . .; Hurley v. Atchison, Topeka & Santa Fe Ry., 213 U. S. 126 . . .; Red Bud Realty Co. v. South, 96 Ark. 281

(131 S. W. 340); Pacific Ready Cut Homes v. Title I. & T. Co., 216 Cal. 447 . . .; City of Los Angeles v. Knapp, 7 Cal. 2d 168.)"

The original fee contract between Arenas and respondents Clark and Sallee provided for a fee of 10% of the value of the lands awarded to Arenas by the judgment. The second contract was for a fee upon a *quantum meruit* basis payable out of the lands so awarded. Under these contracts, the rule stated in *Wagner v. Sariotti*, 56 Cal. App. 2d 693, at page 697, is applicable. The Court there said:

> "The real question in each case is, whether or not the parties have contracted that the lawyer is to look to the judgment he may secure for his fee. If so, an equitable lien is created. (Citing authorities.)"

The judgments of the District Court and of the Court of Appeals in this cause are solidly grounded in the rule of equity followed by this Court in *United States v. Equitable Trust Co., supra*. That rule, as applied in the case at bar, is for the benefit, and not to the detriment, of the Indian. Moreover, the rule is implicit in the jurisdictional statute. 25 U. S. C. A., Section 345. It would be an idle gesture for Congress to authorize an Indian to sue for an allotment denied him by the Government, and at the same time provide that the lawyer for the Indian could not look to the *res* recovered for his fees and expenses. Manifestly, Congress did not intend to say, by the Act of 1894, that equity must be done to the Indian, but must be denied to his attorney whose labor and skill created the *res*.

It is far more consistent with reason and authority to construe the jurisdictional act as meaning that when the

res (the allotted land) is brought into a court of equity, that court can exercise all of its equity powers in respect to the *res,* as well as between the parties. The Act evinces no purpose to violate the maxim that "Equity delights to do justice, and that not by halves."

The jurisdictional act, if construed as the Government contends in its brief, would afford no adequate relief to an Indian who has been denied his right to an allotment of land in severalty. Without competent counsel to represent him, the Indian would be helpless to litigate under the Act. It is against the interest of the Indian to hold that he has a naked right to prosecute the action provided for in the Act, but that he cannot employ and pay his counsel out of the only property he possesses, or probably ever will possess. Special emphasis is given to the point by the statement of the Court in *United States v. Equitable Trust Co., supra,* that the restrictions against alienation or encumbrance do not apply to situations where the application of the general equity rule is "shown to be essential to the protection of a wronged *cestui que trust.*"

Conclusion.

While the Government does not question the value of respondents' services nor their outlay of expense money in this litigation, it suggests (Pet. pp. 13-15) that respondents should look to Congress for payment of what is due them. The suggestion discounts the power and efficacy of the judicial arm of the Government to do justice in an equitable action pending in one of its courts; and the suggestion implies that the Judicial Branch should violate the rule that Equity, having once obtained jurisdiction of a cause, will dispose of the entire controversy.

The Government overlooks the fact that the Executive arm has put Arenas in his present predicament. It also overlooks the fact that for more than six years last past the Bureau of Indian Affairs has ignored the duty enjoined upon it by the decision of this Court in this case.

Arenas v. United States, 322 U. S. 419.

The plea that respondents make here is primarily for the Indian whose guardian has failed in the discharge of its fiduciary duty and obligation. Instead of trying desperately to defeat the payment of respondents' just claim, the Bureau of Indian Affairs should, in equity, itself pay said claim from Indian funds and, if need be, go to Congress for reimbursement.

Wherefore, respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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